The Central Law Journal.

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CURRENT TOPICS.

A crying evil of our appellate court practice, and one of the most fertile causes of overburdened dockets, is the condition of the record when the case reaches the court above, it usually being an undigested mass including much that is merely formal, and not at all pertinent to the real question in issue. From this mass of chaff the kernel of the controversy must be sifted, and this process involves the expenditure of much labor and pains, and the loss of much valuable time to both court and counsel. It would seem that the difficulty arises from our loose system of pleading, which results in the multiplication, instead of the narrowing, of issues. A valued correspondent, a subscriber of long standing, who is an eminent and experienced practitioner, writes to propose a remedy, the simplicity of which would seem to recommend it, provided it should prove upon trial to be practicable as well, and we, for our part, see no reason why it should not, and upon that subject we invite an expression of the opinions of our readers. Our friend writes as follows:

Editor Central Law Journal:

Having been a subscriber to your valued Journal ever since its first volume, I take the liberty of writing a brief suggestion in relation to the topic of overworked appellate courts.

It seems to me that a great deal of time and labor would be saved to these courts if the records sent them were abbreviated, and that this could be done, at least in very many cases, will appear, I trust, from the following plan, namely: let the syllabus be made in the lower court and not in the upper. This may appear a little odd at first glance, but it is only the same as saying that in appeals the exact questions should be certified, just as is now done in many States in cases in which small amounts are involved. While it would perhaps be difficult to pursue this plan in cases depending upon complicated statements of facts, or upon voluminous evidence, yet in very many others it could be successfully used. Every lawyer must have noticed appeals covering many printed pages, in which there was after all but a single "point" of law to be decided, and that when decided is found stated, perhaps, in four or five lines. Now would it not be better in such a case, less troublesome to the appellate tribunal, and vastly more economical to the litigants, if the lower court would of itself prepare the syllabus—*i. e.*, state concisely the "point" and its views thereon, and then let the upper court either approve or reject the same. I have in mind now an instance in which the "abstract" covered sixteen printed pages, such had been the multiplicity of pleadings, etc., and yet the real question finally presented by the issues could have been stated in just five lines. Provision might be made to the effect that the attorneys should agree on the form of the questions appealed, and on their failure that the court prepare the same, and if either is still dissatisfied that he may prepare the questions according to his own view and support that with a transcript of the original pleadings; any trifling or unnecessary conduct of this kind, however, could be rebuked with a taxation of costs. If statutes, or rules of court, could be adopted as here designated, they would certainly be of material assistance. I would like to know how this plan appears to you or to your readers.

We printed, last week, the very attractive programme of the proceedings of the Missouri Bar Association at its coming second annual meeting, which will take place at Sedalia, on the 27th and 28th of December. It is very much to be hoped, not only that the meeting will be largely attended by those lawyers who are already members of the association, but also that those practitioners who have not yet connected themselves with the organization, will avail themselves of this opportunity to do so by sending their names to some member of the local council in their circuits, or of the general council, to be acted upon by the association at the coming meeting. So far, the success of the association has been all that the most sanguine of its friends could have hoped for it. Barely two years after its organizatiou, it numbers nearly three hundred members, which may properly be said to represent the most eminent and progressive portion of the Missouri bar. It is much to be desired, however, that it should have among its membership, lawyers in every circuit and county, which is not the case at present, 52 of the 116 counties, and 6 of the 29 circuits being unrepresented. It is only by maintaining and perfecting such organizations that the bar can hope to make its influence felt in elevating the standard of professional ethics and intelligence, or in obtaining the enactment of much needed measures of law reform.

LIABILITY OF EXAMINERS OF TITLES TO REAL ESTATE.

The persons embraced under this head may be divided into three classes. First. Private parties who engage in the business of searching records, examining titles and preparing abstracts thereof, for compensation. Second. Search clerks, whose official duty it is to search the public records, and certify returns to inquiries propounded respecting their contents. Third. Attorneys and counsellors at law who are called upon to advise respecting titles. The liability of each for want of skill, or ordinary care and diligence, is well established.[1]

As to what will constitute actionable negligence on the part of an abstractor, it has been held that where a party undertakes for a valuable consideration to furnish another with an abstract of title, or statement of the conveyances and encumbrances affecting a tract of land, and incorrectly reports the quantity of land previously conveyed, he will be liable to respond in damages to the party who, relying upon such information, purchases the land.[2] So where a party employed to examine the records and make an abstract of the title to certain real estate, omitted to note the fact of a judgment and sale of the land for taxes, of which the purchaser was ignorant until the time of redeeming had expired, whereby he was caused to pay out money to remove the cloud upon his title, it was held that the party making the abstract was liable in damages to the purchaser for the sum so paid by him to remove the cloud.[3] In defense to the above, it was contended that the evidence failed to show that at the time the search was made the judgment was of record; but the court held that, in the absence of proof to the contrary, it would be presumed the officers of the court did their duty, and promptly made a record of the judgment and sale. It was also contended that it did not appear from the evidence that the appellants agreed to furnish a complete abstract of all that appeared upon the records relating to, and in any way affecting the title to the property. To which Scofield, J., in delivering the opinion of the court, says: "The evidence shows that the appellants held themselves out to the public as being engaged in the business of searching the public records, and making abstracts of titles for compensation; that appellee requested them to make an abstract of the title to his property, and paid them the compensation which they charged therefor, and this is all that was necessary for the purpose of the present suit. Nor do we consider it was competent for the appellants to limit their liability by an obscure clause in their certificate appended to the abstract, without especially calling the appellee's attention to it. They undertook to furnish him an abstract of what appeared upon the public records affecting the title to his property, and he was authorized to rely upon their competency and fidelity in this respect. When, therefore, they discovered that they could not furnish him with a complete and reliable abstract, it was their duty to notify him of the fact, so that he might apply elsewhere."

In some of the States it is the practice for the examiner, after having ascertained the chain of title by inspection of the records, to direct written requisitions to the clerks of the various offices for searches for incumbrances or liens of record that may affect the property. In large cities this method is rendered necessary, or at least convenient, in order to avoid the throng of applicants which would otherwife crowd the offices, and also to prevent the subjection of the records to the carelessness, or fraudulent designs, of the searchers. In a few of the States it is made the duty of recording officers to search their records, upon application, and give certificates as to the chain of title to any specific real estate therefrom. The liability of all such officers is either fixed by statute or is established under the general law of negligence. They are also liable for the acts or omissions of those whom they delegate to do the work.[4] Thus, the plaintiff intending to purchase certain real estate in the City of Brooklyn, employed the defendant to search for taxes and assessments upon the premises. The defendant afterwards delivered to him two returns, one being a search for taxes, certified by the

[1] Story on Bailm., sec. 431; Chase v. Heaney, 70 Ill. 268.
[2] Clark v. Marshall, 34 Mo. 429.
[3] Chase v. Heaney, 70 Ill. 268.
[4] Gerard's Titles to Real Estate, 757; Kimball v. Connolly, 33 How. 247.

defendant, and the other a search for assessments, certified by a third person, not employed by the plaintiff, and received the usual fees for both searches, with an additional sum for expediting them. The plaintiff completed his purchase, on the faith of these returns, receiving a deed containing a covenant against assessments and incumbrances. An assessment upon the property, for street improvements, not disclosed by the search, was afterwards discovered and paid by the plaintiff. It was in the name of one who owned the property when the proceedings were commenced, but not the owner when the assessment was confirmed or the search was made. There was no evidence that the commissioners were notified of the change of ownership, nor was there any evidence as to the responsibility of the plaintiff's grantor. The court held that the evidence authorized the jury in finding the defendant responsible for negligence in the search for assessments; that the assessment paid by the plaintiff was valid, and a lien at the time it was paid; and that the covenants in the plaintiff's deed furnished no defense, the burden being on the defendant to show, and he having failed to show, that they had preserved, or were available to preserve, the plaintiff from damages or loss.[5] In Pennsylvania it is a part of the duty of a prothonotary to make searches and give certificates of the liens of judgments, and his sureties are liable for damages incurred by a purchaser of the land, through a mistake in the certificate of judgments; and it is immaterial that there is no seal attached to it, and that there is no proof of payment of the fee.[6] So a recorder of deeds and mortgages giving a certificate that he has searched and could find no mortgage, and charging and receiving the fee allowed by law, is liable on his bond if it afterwards appears there was then a mortgage on record by which the party obtaining the search is prejudiced.[7] But where the bond was merely "to deliver up the records and other writings belonging to said office, whole, safe and undefiled, to his successor therein, according to law," the sureties were held not liable for false searches.[8] The officer is not bound to make an examination in the sense of passing upon the legal effect of the instrument, but merely to give information as to what is of record.[9]

The liability of an attorney for defective advice as to titles is the same whether the adviser ranks as a conveyancer or as counsel. If he assumes to act as counsel, and accepts a fee therefor, he will be responsible for his opinions. An attorney, however, is not bound to perfect accuracy or perfect care;[10] but if through his carelessness, or that of his clerk, loss ensues, he is liable.[11] Thus, although relief may be given at the suit of a client against his solicitor for loss sustained by reason of negligence, yet where the loss was in respect of a matter of conduct as to which the advice of the solicitor was founded on the opinions of competent surveyors as to the value of the property, and those opinions submitted to the judgment of the client, the court dismissed the bill.[12]

But where the attorney of the vendee of an estate was employed to investigate the title thereto, and in taking the opinion of counsel thereon, omitted to mention certain instruments materially affecting the title, and upon the faith of the opinion given—which would have been different had the instruments been mentioned,—the attorney was held liable for the damage occasioned by his negligence.[13] Where the client himself has made inquiry, and leads his attorney to believe that he is satisfied in reference to any matter of fact in question, whereby the attorney is lulled into a false feeling of security, he may be excused from a charge of negligence.[14] But great caution should be exercised in relying upon representations made by a client, as the tendency among such is almost universally to depreciate the importance of thorough search, in order, in many instances, to lessen the fee of the attorney. The facts which are held

[5] Morange v. Mix, 44 N. Y. 315.

[6] Zeigler v. Commonwealth, 12 Pa. St. 227.

[7] The securities are liable on the bond for all that the principal is. McCarahan v. Commonwealth, 5 W. & S. 21; Houseman v. Girard L. & B. Ass'n., 81 Pa. St. 256.

[8] Commonwealth v. Harmer, 9 Phil. 90.

[9] Lusk v. Carlen, 5 Ill. 395.

[10] "He is not expected to anticipate rulings overturning the law as it existed when he gave his opinion. It is sufficient if he accepts the law accepted by good professional men." Weeks on Attorneys at Law, 520.

[11] Weeks on Attorneys at Law, 520, and authorities cited.

[12] Chapman v. Chapman, 9 L. R. Eq. 276.

[13] Ireson v. Pearman, 5 Dowl. & R. 687.

[14] Waine v. Kempster, 1 F. & F. 695.

sufficient to absolve an attorney from the duties and liabilities imposed upon him, and the benefit of which is the object of his employer to secure, should be very strong, and will be for a jury to determine.[15] Where an attorney was employed by a client who proposed to advance money on the security of a legacy given under a will to the borrower, it was held that the attorney was not justifiable in relying upon a partial extract from the will furnished by his client, unless the latter agreed to take the responsibility upon himself.[16] In this case, the court says: "The complaint is, that Mr. T did not go to the Commons and examine the will itself. I am of opinion, that by law it is the duty of an attorney not to content himself with a partial extract from a will, unless something pass between himself and his client which shows that it is unnecessary to consult the original." How far an attorney would be justified in relying upon a partial or incomplete abstract furnished him by his client, without having recourse to the records and documents themselves, is a matter yet to be determined.

As to the nature of the liability assumed by one who undertakes to examine the title to real estate and furnish an abstract, or make a search, or to pass an opinion upon the title; and to whom such liability extends, the authorities are not at all agreed. It appears to be settled, however, that the contract is not one of indemnity, but merely an undertaking that he will faithfully and skilfully perform his work. The foundation of an action of damage for a breach thereof, is the implied promise to perform with care, dili gence and sufficient skill, the duty undertaken for the compensation agreed upon, and, therefore, the cause of action arises, if at all, when the certificate of title or search is delivered, and the statute of limitation commences to run from that date.[17] From the language employed by the court in Page v. Trutch,[18] it would seem that the contract was regarded as one of indemnity; but this was not a question in issue in the case. In giving his decision, Deady, J., said: "The certificate is not to be considered a warranty against every frivolous and speculative question which the dishonesty of the debtor or the ingenuity of counsel may interpose against the enforcement of the security; but I think it ought to be held as a warranty or representation, not only that the mortgage would be found or held to be valid at the end of a protracted and expensive litigation, but that there was no palpable grave doubt, or serious question concerning its validity." This was a case in which an attorney was employed to examine the title to property offered as security for a loan, and it was held that he was responsible to the lender, though the expenses of the examination were borne by the borrower.[19] The same attorney was afterwards employed to foreclose the mortgage which was contested, but he was not allowed any extra compensation because of labor and time consumed in such suit in contesting the validity of such mortgage upon a question within the scope of his certificate. The court holding that the defendant having taken the security in question upon the opinion of the attorney that it was valid. Whatever extra labor or risk the latter incurred in the enforcement of the mortgage on account of its alleged invalidity, was incurred in contemplation of law and good morals for himself and not the defendant, and therefore he was only entitled to compensation for an uncontested suit to foreclose. In Pennsylvania it has been held that the liability of an officer for a defective search is to the party who employs him alone, and that an action of damages can not be sustained upon a certificate given to an antecedent purchaser.[20] This becomes a very important question where the practice is for the vendor to procure the requisite searches, inasmuch as the vendee is the only one liable to be damnified by any mistake or inaccuracy in the search. In Houseman v. Girord, etc. Association, above cited, one Leslie was to procure a loan from Houseman, to be secured by a mortgage on his property; plaintiff's

[15] See State v. Leach, 6 Me. 88. Where the party applying to the recorder for a certificate as to incumbrances, stated that he knew about an attachment upon the land, that it did not amount to anything, and that he desired the certificate for his own private use, whereby the recorder was induced to give a clear certificate. *Held*, misconduct, which properly subjected the officer to removal.

[16] Wilson v. Tucker, 3 Stark. 154.

[17] Rankin v. Shaeffer, 4 Mo. App. 108.

[18] 8 Chicago Leg. News, 385, U. S. C. C., D. Oreg.

[19] And see Donaldson v. Haldone, 7 C. & F. 762.

[20] Commonwealth v. Harmer, 9 Phila. 90; Houseman v. Girard Mut. Build. Ass'n, 81 Pa. St. 256; Hood v. Fahnstock, 8 Watts, 489; Brocken v. Miller, 4 W. & S. 110.

conveyancer ordered a search for liens. Through Leslie he obtained a certificate from the recorder to the effect that all was right. It afterwards proved that there was a mortgage on record covering the full value of the security. The court held that the recorder was liable, and that the employment of Leslie by the plaintiff did not affect them by his knowledge; nor was it negligence on the part of the conveyancer, imputable to the plaintiff. In another case it was held that, although the recording officer is liable only to the person who employs him, he may, by affirming its correctness to another, become liable for a mistake therein to such other person. This was a case in which a certificate was given to a borrower of money, and the lender, not relying on it, sent his agent with the borrower to the officer who, at the request of the agent, made a new search of the records, and reaffirmed the correctness of his certificate, which was held to be a renewal and redelivery of the certificate direct to the lender. [21]

We apprehend that the correct rule would be, that where an examiner gives a certificate respecting title to an intended vendor, he is responsible for its correctness to one dealing with such person upon the faith of the certificate given. The purchaser, we conclude, in all ordinary transactions of this kind, may fairly be considered as a party to the undertaking of the examiner. But where the certificate has been transmitted to other parties, no privity of contract exists, and there is no consideration for a new obligation, consequently the examiner should not be held liable. To sustain a claim of damages, it must appear that actual damages were sustained, by reason of the negligence complained of. [22] If no money is advanced on the faith of the examiner's certificate, as where, at the time of the examination, the property had already been bought and paid for, there can be no recovery for a failure to report an incumbrance; nor where the judgment omitted in the certificate is voluntarily paid and satisfied of record by the purchaser. The defendant may show that the person against whom the judgment was rendered, had, at the time the judgment was paid by the plaintiff in the damage suit, other unincumbered real estate in the county, sufficient to satisfy the judgment. So, where the existence of the lien omitted in the abstract can be material to the purchaser only by reason of an understanding between him and his grantor, of which the examiner was ignorant, and by reason of which a deed, appearing upon its face to be absolute, was held to be a mortgage, no action will lie. [23]

W. B. MARTINDALE.

[21] Sievers v. Commonwealth, 6 Week. Not. Cas. 17.
[22] Kimball v. Connolly, 42 N. Y. 57.
[23] Roberts v. Sterling, 4 Mo. App. 593.

PRIVILEGE —PHYSICIAN'S EVIDENCE IN LIFE INSURANCE CASES.

When Mr. Bliss wrote his able work on Life Insurance, he said: [1] "New York has a peculiar statute which forbids a physician to disclose any information which he may have acquired in attending any patient in a professional capacity. Though passed for a very different purpose, it is claimed that its terms cover the case of a physician referred to by the applicant and also the physician who attends during the final illness. No reported case has passed upon this statute as applicable to life insurance, but in an unreported case at *nisi prius*, objections to evidence based on this statute were overruled."

Since this was written, however (1871), this statute has been frequently passed upon by the Court of Appeals, and the fact that similar statutes exist in many of the States, makes this a question of quite general interest and importance.

Information acquired by physicians during the treatment of a patient was not privileged at the common law, though we find the judges at an early day deprecating the fact that such was the law, and strongly urging the extension of the rule of privilege to cover cases of this nature. [2]

The statute referred to is as follows: "No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired

[1] Sec. 381.
[2] Duchess of Kingston's Case, 20 How. St. Tr. 613; Wilson v. Ratsall, 4 T. R. 759; 1 Whart. on Ev., sec. 606.

in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or do any act for him as a surgeon. [3]

The first reported life insurance case in which this statute was applied, is that of Edington v. Mutual Life Ins. Co.,[4] where the court say: "The testimony of the physicians, offered upon the trial, we also think was properly rejected, for the reason that the information asked for was obtained by the several physicians while attending the insured, as a patient, in a professional character, and was, therefore, privileged within the provisions of a statute of this State.[5] The statute is very explicit in forbidding a physician from disclosing any information received by him which is necessary to enable him to prescribe for a patient under his charge. It is a just and useful enactment, introduced to give protection to those who were in charge of physicians from the secrets disclosed to enable them properly to prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sick bed, or when consulting a physician, would destroy confidence between the physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship. The point made that there was no evidence that the information asked for was essential to enable the physician to prescribe, is not well taken, as it must be assumed from the relationship existing that the information would not have been imparted except for the purpose of aiding the physician in prescribing for the patient. Aside from this, however, the statute in question, being remedial, should receive a liberal interpretation, and not be restricted by any technical rule. When it speaks of information it means not only communications received from the lips of the patient, but such knowledge as may be acquired from the patient himself, from the statement of others who may surround him at the time, or from observation of his appearance and symptoms. Even if the patient could not speak, or his mental powers were so affected that he could not accurately state the nature of his disease, the astute medical observer would readily comprehend his condition. Information thus acquired is clearly within the scope and meaning of the statute." It is further held that "there is no ground for claiming that the right of objecting to the disclosure of a privileged communication is strictly personal to the party making it, or to his personal representatives, and that it can not be available to a third party. No valid reason is shown why an assignee does not stand in the same position in this respect as the original party, and the decease of the latter can not affect the right of the former to assert the privilege." In Dilleber v. Home Life Ins. Co.,[6] decided 1877, the same rule was reiterated and approved. In Grattan v. Metropolitan Life Ins. Co.,[7] decided March, 1880, this ruling is again affirmed. After citing these previous cases, the court say: "In the case before us, the referee had presented for examination a witness who was first called to the sick woman that he might discover her disease. He learned the symptoms of it that he might treat her, and watched the symptoms as they developed and terminated in her death. It was for such a purpose, and during this time only, that he saw her, and during all this time he attended her as her physician. He had acquired knowledge in no other capacity, or for any other purpose. He had none, therefore, that he could disclose. His diagnosis was made upon her employment, and whether aided in this by visible sign, or audible communication, can make no difference. Whatever opportunity he had for knowledge concerning her, was afforded by his employment, and its import was necessary to him that he might to her advantage practice his art, or, in the language of the statute "prescribe" for her. The information so obtained must remain enclosed with him, for he is forbidden by statute to "disclose" it. The word must be taken in its fullest sense. He must not tell it; not because the patient declared the communication to be confidential, or because the physician considered it so, but because the statute says that the communication to him shall not be by him disclosed or told. Any other rule will annul the statute, and permit

[3] 2 R. S., 406.
[4] 67 N. Y., 185.
[5] 2 R. S., 406, sec. 73.
[6] 69 N. Y., 256.
[7] 80 N. Y., 281; S. C., 33 Am. Rep. 435.

it to be evaded. I confine these observations to the case in hand, or one similar, where communications begin with and follow the employment of the physician, and are the result, or consequence, of the relation he sustains to his employer or patient. The court need lay down no rule; the statute is the rule, and we are merely to inquire whether the case comes within it. If it does, we should abide by it."

The case of Edington v. Ætna Life Ins. Co.,[8] has been cited as authority for a contrary rule, but an examination of the case discloses the fact that the opinion of Earl, J., who announced the decision of the court, was not concurred in by the remainder of the court, who simply concurred in the result; while it appears that in Grattan v. Metropolitan Life Ins. Co., above cited, Earl, J., dissents from the opinion of the court upon this very question. The case can not, therefore, be regarded as authority, or as expressing the opinion of the Court of Appeals.

The Michigan statute is an exact copy of that of New York, but it has received a little different interpretation. Although not relied upon in any reported life insurance case, its scope has been pretty clearly defined. In Scripps v. Foster,[9] Marston, J., says: "The object of the statute[10] is to prevent the abuse of the confidential relation existing between the physician and his patient, and is for the protection of the latter. Where the relation is such that no confidence is reposed, there is none to be abused." Graves and Cooley, JJ., concurred. Campbell, J., said: "I agree with my brother Marston, that the rule excluding medical testimony of matters learned in medical treatment, is a rule of privilege against the betrayal of personal confidence." In Fraser v. Jennison,[11] the court, per Cooley, J., say: "This statute, as we have held, covers information acquired by observation while in attendance upon his patient, as well as communications made by the patient to him;[12] but the rule it establishes is one of privilege for the protection of the patient;[13] and he may waive it if he sees fit, and what he may do in his life time, those who represent him after his death may also do for the protection of the interests they claim under him."[14] In Campan v. North,[15] it is said: "The rule given by the statute is beneficial and based on elevated grounds of policy, and it ought not to be frittered away by refinements. It is not to be forgotten, however, that parties have their rights. * * * * So far as practicable, the courts ought to see to it that the statute is not used as a mere guard against exposure of the untruth of a party, and that a rule intended as a shield is not turned into a sword."

In regard to the means by which the information is acquired, Michigan agrees with New York, the court, in Briggs v. Briggs,[16] Cooley, J., saying: "We do not understand the information here referred to, to be confined to communications made by the patient to the physician, but regard it as protecting with the veil of privilege, whatever, in order to enable the physician to prescribe, was disclosed to any of his senses, and which, in any way, was brought to his knowledge for that purpose." In the recent Indiana case of Masonic Mutual Benefit Society v. Beck,[17] this question came before the Supreme Court of that State. By the terms of the statute on the

[8] 77 N. Y., 564.
[9] 41 Mich. 742.
[10] 2 Comp. Laws, sec. 5943.
[11] 42 Mich. 225.
[12] Briggs v. Briggs, 20 Mich. 34.
[13] Scripps v. Foster, 41 Mich. 472.

[14] In a recent case at *Nisi Prius*, in which the writer was interested as attorney for the insurance company, this rule of privilege and waiver threatened to operate disastrously for the company. An insured party died under such circumstances as would seem to indicate poor health at the time of the insurance. Owing to the peculiar circumstances of the case, a number of physicians who had visited the man professionally, took contrary views in regard to the cause of his death, and this situation of affairs seemed to present itself: Assuming that in this case the burden of proof was upon the defendant (the insurance company), it would have called as witnesses certain of these physicians whose views in reference to the cause of death were favorable to the defense and unfavorable to the plaintiff. The plaintiff immediately objects, upon the ground of privilege, and the objection must be sustained. The plaintiff then calls certain other physicians, whose testimony will be favorable to him and unfavorable to the defense. The defendant objects upon the same statute, but "No," the plaintiff replies, "this is a rule of privilege for our protection, and now for our protection we waive it, and will permit these physicians whose evidence is valuable to us to testify." Having once removed the seal fromt he lips of any one witness, the plaintiff could not then restore it; but a waiver in regard to one witness, could hardly be deemed a waiver as to all, and a very one-sided investigation might result. The case was compromised before trial, so that no ruling was had upon the points discussed.

[15] 39 Mich. 606; s. c., 33 Am. Rep. 433.
[16] 20 Mich. 34.
[17] Reported in 11 Ins. L. J. 755 (October, 1882).

subject in force when the trial was had, physicians were not competent witnesses "as to matters confided to them in course of their profession, * * * * unless with consent of the party making such confidential communication." The court say: "The question to be decided is, whether the physician, who, in the course of the treatment of his patient, has obtained a knowledge of his ailments, is competent to testify in relation thereto in a civil action without consent of patient or of the party representing the patient. The position of counsel for the appellant, as we understand them is, that before the testimony of the physicians can be excluded under the statute, it must affirmatively appear that the information was confided to him which he is called on to disclose; and that he may be required to testify as to what he learned by observation, or by an examination of the patient, and, indeed, as to what the patient told him, unless learned or told under an injunction of secrecy, express or implied, as in cases of secret or private diseases. We think the statute ought to have, and was designed to have, a much broader scope. The relation of physician and patient, no matter what the supposed ailment, should be protected, as strictly confidential, subject only to the right of the patient to waive the restriction, or, if the patient shall have died, then subject to the choice of the party who may be said to stand in the place of the deceased, and whose interests may be affected by the proposed disclosure. His admission to the bedside of the sick one, may enable the experienced and skilful practitioner to discern more of the patient's condition and of the causes which brought it about, than the patient himself could tell, or would be willing to reveal; and whether, therefore, the information which he gets is obtained in one way or the other, should make no difference in the application of the rule." The court then quote from the case of Edington v. Mut. L. Ins. Co.,[18] above cited, and say: "The foregoing was said in reference to the law of New York, but we deem it equally applicable to our own law on the subject," and cite with approval the other cases above referred to.[19]

[18] 5 Hun, 1; 67 N. Y. 185.

[19] Grattan v. Metropolitan L. Ins. Co., 80 N. Y. 281; Dilleber v. Home L. Ins. Co., 69 N. Y. 256; Edington v. Mut. L. Ins. Co., 67 N. Y. 185; Briggs v. Briggs, 20 Mich. 34; Collins v. Mack, 31 Ark. 684.

It is held both in New York and Indiana, that no consent can be implied from the fact that the deceased, in his application for insurance, had referred the company to the physicians whose testimony was excluded.[20]

Battle Creek, Mich. F. R. MECHEM.

[20] Edington v. Mutual L. Ins. Co., 67 N. Y. 185; Masonic Mut. Ben. Soc. v. Beck, 11 Ins. L. J. 755.

RAILROADS — DUTY OF TRAIN MEN AT FLAG STATIONS—MEASURE OF DAMAGES.

MORSE v. DUNCAN.

Circuit Court of the United States, Southern District of Mississippi, November 29, 1882.

1. It is the duty of those in charge of a railway train on approaching a station, where such trains stop, upon being flagged so to do, to be on the alert, and to keep a look out for such signal and to stop when it is given.

2. In the absence of gross negligence, recklessness, wilfulness, malice, insult or inhumanity, actual damages can only be allowed.

3. No recovery can be allowed for inconvenience or even physical hardship when the same are voluntarily undertaken.

4. The general rule is "that pain of mind is only the subject of damages when connected with bodily injury; it must be so connected in order to include it in the estimate, unless the injury is accompanied by circumstances of malice, insult or inhumanity.

William G. Grace, solicitor for the petitioner; *E. L. Russell* and *B. B. Boone*, solicitors for the respondent.

HILL, J., delivered the opinion of the court:

This is a petition claiming damages from the defendant for the alleged default of the defendant's employees in neglecting to stop defendant's passenger trains at Marion, a flag station on the Mobile & Ohio R. Co., of which defendant is receiver, to take petitioner on board said trains and transport him to Scooba on said road. The allegations of the petition are denied.

The proof shows that petitioner went to the station at Marion on the morning of December 29, 1881, to take the train for Scooba; that the train passed the usual place for stopping to put off and take on passengers; that after remaining some four or five minutes passed on; that before stopping the whistle was blown to give notice of the coming of the train and intention to stop; that passing the usual place of stopping was for the purpose of transferring a lady and her children with their baggage from the train to a freight train, to be returned to Meridian, where she had gotten on the train by mistake; that not being flagged or having any notice that any one wished to get on the train at that place the train passed on. There is no allegation in the petition or any proof

that the train was flagged that morning. The petitioner was advised by an employee of the postmaster at Marion that the train would back down to the usual place of stopping, and did not attempt to get on the train and was left. This was a misfortune to petitioner, but without fault on on the part of the conductor or other employees of the defendant, hence no recovery can be had for this misfortune.

The proof by petitioner and another young man who designed to take the train on the same morning, as well as by the employee of the postmaster, who took the mail to the train and received it, and who was in the habit of giving signals for the stoppage of the train is, that on the 30th inst. he did flag it for the purpose of stopping the train to enable the petitioner and the other witness to get on the train, and that it passed on without stopping. The conductor and the engineer in charge of the train testify that their uniform custom is to look for the signal at that place, and that none was given that morning. I presume that the witnesses on behalf of the petitioner testify truly, and that the signal was given, and must believe that defendant's witnesses testify truly in stating that they did not see the signal, and can only reconcile the conflict by holding that they were mistaken in their opinion that they noticed or looked for the signal sufficiently to discover it, and which it was their duty to have done.

Under these circumstances petitioner is only entitled to the actual pecuniary damages he has shown he sustained by reason of his failure to get upon the train that morning. He alleges, but does not prove, that he had to procure a private conveyance and go with his trunk to Meridian to get on the train, he does not prove that he paid anything for this conveyance; but, presuming that he did, and had to pay for his night's lodging and for supper, five dollars would cover the amount, including loss of time; he further proves that when he arrived at Scooba the conveyance which was there the day before had left, and that he had to walk through the mud a distance of twelve miles and procure a wagon next day and return for his trunk, for which his brother-in-law charged him two dollars and a half, which was certainly a full price for a brother-in-law, but if he had chosen so to do, he could doubtless have procured a conveyance from Scooba for five dollars that would have taken both himself and trunk home the day he arrived, and saved himself that muddy walk. Inasmuch as this muddy walk was undertaken voluntarily by the petitioner, no compensation can be allowed him therefor. Francis v. St. Louis Transfer Co., 5 Mo. App. 7; Trigg v. St. Louis, etc. R. Co., 6 Am. & Eng. Ry. Cas. 349. So that $5 for his actual damages at this end of the line will be full compensation, unless we consider the extreme "anguish of mind he endured;" if he is not more fortunate than most men, he will meet many as severe in life without a thought of compensation. The general rule is, that "pain of mind is only the subject of damages when connected with bodily injury; it must be so connected in order to include it in the estimate, unless the injury is accompanied by circumstances of malice, insult or inhumanity." Pierce on Railroads (ed. 1881), 362; I., B. & W. Ry. Co. v. Birney, 71 Ill. 391; P. P. Car Co. v. Barker, 7 Col. 377; Francis v. St. Louis Transfer Company, 5 Mo. App. 7.

Had the engineer or conductor seen the signal and disregarded it, then punitive damages might have been awarded; but as the signal used was one of danger—a red light—it is not to be presumed either of them saw it and disregarded it, so that its non-observance was more an accident than otherwise, for which, as already stated, none but actual damages can be awarded. Cincinnati, etc. R. Co. v. Scurr, 59 Miss. —; Nelson v. Atlantic and Pacific R. Co., 68 Mo. 593; 2 Redf. on Railways (5th ed), 262; Milwaukee R. Co. v. Arms, 91 U. S. 489. The receiver will pay the petitioner the sum of $10, and as there is no proof that this sum was tendered, will also pay the costs of this proceeding.

FIXTURE—STEAM ENGINE AND BOILERS.

THOMAS v. DAVIS.

Supreme Court of Missouri, November, 1882.

Where a steam engine, boiler and machinery are annexed to the building by the owner of the fee for permanent and habitual use, for the purpose of smelting lead ore and manufacturing it into pig lead, they become a fixture and part of the realty, and pass to the mortgagee or purchaser by the conveyance of the lot on which the building stands.

HENRY, J., delivered the opinion of the court: This suit is for the recovery of a steam engine and accompanying machinery and for damages. Plaintiff had judgment, from which defendants appealed. Plaintiff claims the property under a deed of trust executed by one Corn, conveying to him lot 19 and other lots in the city of Joplin, to secure a promissory note executed by Corn. On said lot was a building erected by Corn, in which the machinery in question was placed by him for the purpose of smelting lead. This deed was executed June 4, 1874. On the 11th of June, 1875, Corn executed a second deed of trust to secure certain other creditors, conveying to Ed. P. Allen said lot 19 and other lots conveyed by the prior deed, and also other real estate not mentioned in the other deed. Said real estate was in the latter deed conveyed, "together with all the privileges, including my residence, furnaces, engines, boilers and machinery, situated on said property described or any part thereof."

Defendant purchased the property conveyed by said second deed at a sale thereof by said trustee on the 20th day of May, 1876, and removed the machinery in controversy from the building.

The testimony as to the manner in which the machinery was annexed to the building is as follows: James S. Zane testified: "The defendant asked him if he knew a man who would move the engine and boiler and machinery out of Corn's smelter in Joplin, and witness sent him Mr. Bently for that purpose; that Bently brought the machinery to Thurman and put it in witness' care; that the smelting building was built in 1872; the boiler rested on an iron post, and the post sat on a stone foundation; the boiler rested on iron posts, and the posts on the stone work; the brick work was built up the sides of the boiler for holding the heat; the foundation was stone, and brick work half way up the boiler; the engine sat on cross timbers; the pipes leading from the eyes ran into the back of the jam; the fan rested on timbers; the frame work is just timbers laid down; the pipes were fitted to the jam tight; the expense of taking the machinery back and setting it up would be $250; the things removed by defendant were the boiler and engine and apparatus connected therewith; the boiler was a portable boiler, and had been used in some other place or places before being in the smelting furnace."

Mr. M. James testified: "At the date of the deed of trust there was a large frame building on the lots erected in 1872, which was erected and the machinery placed in it for the purpose of smelting lead mineral into pig lead. There are studding which support the roof. The building was built in a substantial manner, was painted, and had in it a boiler, pump, fan, water tank, pulleys, air drum and three eyes. There was a slug eye, one was Scotch heath, one a basin, and the other a water back. The eye consisted of a jam, or basin. There was a brick or cast iron basin, and cast iron hearth; the hearth and basin were in one piece. The three stacks were all connected and rested on stone foundation of solid masonry. Thickness of the base of the stacks was from eight to ten feet; it was eight or ten feet from the base of the stack; two of the stacks were brick to the roof, and then sheet iron. The engine was set down on the left hand side of the boiler upon sills set in the ground; there were two sills under ground crossing them, and the upper sills bolted to the lower. The foundation of the boiler was of stone let into the ground. Half way up the side of the engine ran to a pulley on a line of shafting to a pulley or head firmly attached to the upright studding on cross beams; from that line of shafting there was a pulley running down to the fan blower. There was a pump to furnish water for the boiler and to wash mineral. The stone work, the brick work and building and the stacks were on the left. The expense of hauling the machinery back after it was seized in this suit was fifty odd dollars. The building was built by S B. Corn, permanent in character, and the machinery placed in it was intended and adapted to the purpose of a smelting furnace."

If the articles sued for were fixtures defendant acquired no title by his purchase, but they passed by the deed to plaintiff. If not so attached to the freehold that they became part of the realty, defendant acquired the title to them by his purchase and plaintiff had no right to recover.

It is difficult to define the term "fixture," and there is inextricable confusion, both in the text books and adjudged cases, as to what constitutes such annexation of chattels to the realty as to make them part and pass by a conveyance to the realty. An attempt to reconcile the authorities on the subject would be futile, and to review them would be an endless task. As was observed by Kent, J., in Strickland v. Parker, 54 Me. 265: "It is not to be disguised that there is almost bewildering difference and uncertainty in the various authorities, English and American, on the subject of fixtures, and on the question of what passes by a transfer of the realty. One thing is quite clear in the midst of the darkness, and that is that no general rule applicable to all cases and all relations of the parties can be extracted from the authorities."

As between mortgagor and mortgagee, it is well settled that the same rule applies which exists with respect to fixtures, as between heirs and executors. Ewell on Fixtures, 27; Hill on Fixtures, 60. In Fisher v. Dixon, 12 Cl. & F. 312, cited by Mr. Hill, the House of Lords held that "where the absolute owner of land in fee, for the better use of land, erects upon and affixes to the freehold certain machinery, such as is in use in making coal and in mines, it will go to the heirs as part of the real estate; and if the corpus of such machinery belongs to the heirs, all that belongs to the machinery, although more or less capable of being detached from it, being used in such detached state, must be considered as belonging to the heir."

In Mather v. Fraser, 2 Kay and Johnson, also cited by Mr. Hill, Vice-Chancellor Wood held that "even in regard to manufacturers all articles affixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, will descend to the heir, or pass by conveyance of the land. The rule of law by which fixtures are held less strictly, when erected for manufacturing purposes, has no application when erected by the owner of land in fee. It is held in New York that, as between mortgagor and mortgagee, whatever is annexed or affixed to the freehold by being let into the soil, or annexed to it, or to some erection upon it to be habitually used there particularly for the purpose of enjoying the realty or some profit therefrom, is part of the realty. Buckley v. Buckley, 11 Barb, 43; Fisher v. Sapper, 1 E. D. Smith, 61. The true criterion of an immovable fixture (says Mr. Ewell) consists in the united application of several tests: 1st, real or constructive annexation of the article in question to the realty; 2d, or adaptation to the use or purpose of that part of the realty with which it is connected; 3d, the intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the

relation and the situation of the parties making the annexation, and the policy of the law in relation thereto, the structure and mode of annexation, and the purpose or use for which the annexation has been made." Whether the article can be detached and removed without either the destruction or impairment or substantial injury to the freehold, has, in some instances, been held the test. It may as between landlord and tenant, with respect to articles attached by the latter, without previous agreement between them fixing their character, but this is not an infallible test as between mortgagor and mortgagee. Some of the exceptional cases, says Parker, C. J., in Despatch Line of Packets v. Belamy Manf. Co., 12 N. H. 232, seems to have made the question depend upon the character of the fastenings, whether slight or otherwise; but this as a criterion is of questionable charaeter not sustained by the weight of the decisions. More depends upon the nature of the article and of its use as connected with the use of the freehold."

This doctrine was approved in Lathorp v. Bishop, 23 N. H. 66, but in the same case in the succeeding paragraph the court remarked that, "it is however necessary that the machines or other articles should in some way have been connected with the realty, or have been so placed there that the removal of them would involve either the destruction or impairment or substantial injury to the freehold, in order that the same shall be regarded as constituting a part of it."

There seems to be contradiction between these two statements and Burnside v. Twitchell, 43 N. H. 290, the doctrine as announced by Parker, C. J., *supra*, is: If the fixture is one to become a part of the realty, it must be so firmly annexed as that its removal would involve the destruction, impairment or substantial injury to the freehold, the manner of annexation, whether slight or otherwise, would seem to be a material question. We are inclined to the opinion that the true doctrine was announced by Parker. C. J. In Strickland v. Parker, 54 Me. 263; Parsons v. Copeland, 38 Me. 537, the court observed that, "It is the permanent and habitual annexation, and not the manner of fastening, that determines when personal property becomes part of the realty."

Many articles have been held to be fixtures in controversy between grantors and grantees, and mortgagors and mortgagees, which, although attached to the freehold, could have been removed without substantial injury to the freehold, and in disputes between persons holding these relations to each other, the adjudications in which contests between landlord and tenant have little or no application, because the strict rules which are applied in the former class of conclusions, have been relaxed with a view to the encouragement of mechanical and agricultural pursuits.

As between landlord and tenant evidence of custom with respect to articles annexed to the realty by which they are treated as personalty, is admissible, but not so with respect to articles thus annexed by mortgagor or grantor before the execution of the conveyance. He has absolute dominion over the property, both real and personal, and his intention in making the annexation is to be determined by the consideration of the character of the annexation, and its appropriation and adaptation to the use or purpose of that part of the realty with which it is connected. Ewell v. Fixtures, *supra*.

Judge Story, in Van Ness v. Packard, 2 Pet. 137, observes, that: "Every demise between landlord and tenant in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country, or of the district where the land lies. Every person under such circumstances is supposed to be conusant of the custom, and so contracts with a tacit reference to it.

But we can not conceive how there could be a custom to control the effect of a deed between grantor and grantee. What would pass by the deed as part of the realty, could only be explained by express reservation; and such reservation would have to be made in every deed, for no number of express understandings, in deed, would establish a custom. A custom which might be clearly established as between landlord and tenant, could not possibly affect a conveyance by the owner of the fee, who had annexedthe chattel to the realty. We are of the opinion that the court did not err in excluding the evidence offered by defendant to prove a custom by which the streets in question are regarded as chattels. The instruction asked by defendant, and refused by the court, did not declare the law applicable to the case. It entirely ignored, not only the question of the manner in which the machinery was attached to the realty, but also the question of its permanent and habitual annexation, and all the tests by which it is determined; whether chattels annexed to realty are a part of the realty, or retain their character of personalty, except one which we have seen, is not the only or an infallible test. It was in substance that if the machinery was put into the building and used for the purpose of manufacturing pig lead, and that it could be or was removed from said building without doing material damage to itself or such building, it was personal property. Under such an instruction, if the machinery could be removed without material injury to itself or the realty, it was wholly immaterial how firmly or permanently attached, or with what purpose it was annexed to the realty. Such is not our view of the law, and the court properly refused it. The court tried the case without the intervention of a jury by agreement, and necessarily passed upon the questions ignored by the refused instructions, and as no other instructions were asked or given, we are not inclined to interfere with the verdict.

All the judges concurring, the judgment is affirmed.

AGENCY — PURCHASE UPON CREDIT — CUSTOM OF TRADE — LIABILITY OF PRINCIPAL.

KAMAROWSKI v. KRUMDICK.

Supreme Court of Wisconsin, October 31,1882.

1. In the absence of express authority or a custom of the trade to buy upon credit, an agent who is furnished with funds to make purchases can not bind his principal by a purchase upon credit.

2. If goods are sold to such agent upon credit, and are by him delivered to the principal, the latter will not be liable to the vendor unless he received the goods knowing them to have been bought on credit, or that he had no funds in the hands of the agent at the time sufficient to pay for the goods.

3. In an action upon contract for the purchase price of goods sold and delivered to the defendants through their agent, if the proof shows that the goods were not sold, but were merely held in store for the plaintiff by the agent, and were by him afterwards delivered by the defendants, who converted them to their own use, there can be no recovery, unless the complaint be amended. Whether an amendment should be permitted in such case, *quære*.

4. In such an action it is competent for the defendants to show, in order to disprove a sale, that the plaintiff had arrested the agent for the conversion of the goods stored with him.

Appeal from Circuit Court, Trempealeau County.

Button Bros., for respondent; *E. C. Higbee*, for appellants.

TAYLOR, J., delivered the opinion of the court:

This action was commenced in a justice's court to recover the value of about 180 bushels of wheat which the plaintiff alleges he sold and delivered to the defendants some time in February, 1878. His complaint states that the agreement was that the defendants were to pay the market price for said wheat at any time the plaintiff should call for his money, and further states that subsequent to said sale, and before the commencement of this action, he demanded his pay for said wheat, and that the defendants had not paid for the same or any part thereof, except the sum of $40; that the wheat at the time of the sale, and at the time of the demand of pay, was worth one dollar per bushel. The defendants' answer was a general denial. The plaintiff recovered in justice's court, and the defendants appealed to the Circuit Court of Trempealeau County. Upon the trial in that court the jury returned a verdict for the plaintiff against the defendants for the value of the wheat, and the defendants again appeal to this court.

The evidence given at the trial in the circuit court was substantially as follows: A witness for the plaintiff, Baumgertner, testified that "he heard the defendant Muir state that during the year 1878 he employed John Grist to buy wheat for the firm of Krumdick & Muir, and that he placed money in the hands of J. C. Burgeast to pay for the wheat Grist bought for the company. I think he said Grist was there at the time this wheat was delivered." The plaintiff himself testified: "I know the defendants, I have sold wheat. I delivered it in April, 1878. I sold and delivered it to John Grist—162 40-60 bushels. I have received pay for forty bushels at one dollar per bushel. John Burgeast gave me the money. Grist sent me to him to get the money. I got two wheat checks. * * * The wheat was put into the warehouse of John Grist. He was using it at the time." Question. "Who did he tell you he was buying the wheat for?" Objected to by defendants. Objection overruled and defendant excepts. "He said at the time he bought the wheat he would send the wheat to the company, Krumdick & Muir, at Arcadia. I had a conversation with Grist two days after I delivered the wheat at the warehouse, at which time he said he had sent the wheat to Krumdick & Muir." "The wheat was worth $1.05 per bushel at the time I received the $40, two months afterwards. I received it of Burgeast; he was paying off for Krumdick & Muir."

On the cross-examination he testified: "When I delivered the wheat I received checks for it. These are the checks." The plaintiff produced two checks, which were put in evidence by the defendants as a part of the cross-examination. The following is a copy of one of the checks; they were both alike except as to the quantity of wheat:

"John Grist, in store of V. Kamarowski, 2 loads —84.20—wheat at ——— per bushel, if all alike. Dodge, 3—22, 1878. J. GRIST, Buyer."

"I sold the wheat and he, Grist, gave me the checks. When I got the $40 I told him I would sell forty bushels of wheat. That was in July. I had put the wheat there in April before. I told him I would not sell it, and in July I went to him and told him I would like to sell forty bushels, and would like to get the money; and I did sell him forty bushels, and got my money. Afterwards Grist left Dodge and went to Dakota."

Question. "Did you have him arrested for taking this wheat?" Objected to by plaintiff. Objection sustained, and defendant excepted.

On his redirect examination he said he got the checks given in evidence about two months after he delivered the wheat to Grist; said he had three such tickets, and gave up one to Grist when he got the $40, and that when he first saw Muir about this wheat Muir told him Grist owed him more than all the tickets. This was all the objection made to paying him.

The evidence of the defendants was that Grist ceased buying wheat for them in May, 1878; that his authority from the defendants was to buy wheat for cash and not in any other way; that he had no authority to take wheat in stote for the defendants, and had specific instructions not to do so, and he was to ship the wheat to them as fast as he got car loads; that they sent the money by express to buy wheat for them. The only other

evidence in the case introduced by either party related to a certain conversation had between the parties after Grist had left the country,and which has no force in establishing any sale of the wheat by the plaintiff to the defendants.

This evidence may have a tendency to prove three things; First, that the plaintiff sold his wheat to Grist as the agent of the defendant upon credit; second, that he did not sell it to any one except as to the forty bushels for which he received his pay; and, third, that he sold it to Grist upon the terms set out in the complaint. If the learned circuit judge was right in his construction of the checks given to the plaiatiff by Grist, that they were evidence of a sale and not that the wheat was delivered to Grist in store for the plaintiff, the price to be fixed by the market price at some future day (upon which point we give no opinion), then such checks and the other evidence might justify a jury in finding either a sale to Grist individually, or a sale to him as the agent of the defendants. But if it proved a sale to Grist as the agent of the defendants at the time of the delivery of the wheat, then it was clearly a sale upon credit, and not for cash; and if it could be construed as a sale to Grist, as agent of the defendants at the time he got his pay for the forty bushels, which is the time he says he got the checks given in evidence, then it was still a sale on credit,and was made after Grist had ceased to act as agent for the defendants. In either case the sale to and purchase by Grist would not bind these defendants. The power of Grist as the agent of the defendants was limited to purchases for cash and nothing else, and he was expressly prohibited from taking wheat in store on their account.

When the principal furnishes his agent to buy on his account sufficient funds to make the purchases, the law does not raise any presumption that such agent may bind his principal by a purchase on credit, but the contrary. And in such case the principal will not be bound by a purchase made on credit, unless he has knowledge of the fact, and does something in ratification thereof, or unless it be shown that it is the custom of the trade to buy upon credit. The defendants furnished Grist the money to pay for all purchases made by him on their account, and the evidence tends to show that Grist did not deliver to them enough wheat to cover the amount of their advances. There is nothing in the evidence tending to show that the defendants held Grist out as having any other powers as their agent than those expressly conferred upon him. There is no evidence that the defendants had ever ratified any purchases by Grist for them upon credit. There is no evidence, in fact, that he ever made any purchase except of the plaintiff upon credit. Nor is there any evidence that an agent to purchase wheat for a principal at a given place, and to ship the same to the principal at another place, has any implied authority to make the purchases upon the credit of the principal. There is nothing in the nature of the business itself, in the absence of any evidence as to the custom of the trade, which would justify a court in determining as a question of law that an agent to purchase wheat or other grain may bind his principal by a purchase on credit. An agent to buy wheat or other grain must, in order to bind his principal, who furnishes in advance the funds to make the purchases, buy for cash, unless he has express power to buy upon credit, or unless the custom of the trade is to buy upon credit; and in the absence of express authority, or proof of the custom of the trade to buy on credit, such agent can not bind his principal, by a purchase upon credit of a person who is ignorant of his real authority as between himself and his principal. Paley on Ag. 161, 162; Jaques v. Todd, 3 Wend. 83; Schimmelpennick v. Bayard, 1 Pet. 264; Story on Ag., secs. 225, 226; Berry v. Barnes, 23 Ark. 411; Stoddard v. McIlvain, 7 Rich. (S. C.) 525; Whart. on Ag., sec. 186; Adams v. Boers, 24 Iowa, 96; Tabor v. Cameron, 8 Met. 456; Temple v. Pomeroy, 4 Lay. 128; Bank v. Bugbee, 1 Abb. Ch. App. 86.

We think the learned circuit judge erred in submitting the question of the power of Grist to bind the defendants by a purchase upon credit, and as to his power to receive it in store and to hold it for the defendants upon a contract to pay for it at a future time, price to be fixed at the market price when the plaintiff should demand his pay. We are very clear that there is no evidence in the case which would justify a jury in finding that there was a sale and delivery of the wheat by the plaintiff to the defendants through their agent Grist, which bound the defendants. The great weight of the evidence tends to show that the plaintiff never sold the wheat to any one, but that it was held in store by Grist for him, to be sold when the price was satisfactory, or when his necessities required him to have the money. In that view of the case, if the wheat was afterwards delivered by Grist to the defendants without the consent of the plaintiff, and they received the same and converted it to their own use, they might be liable to the plaintiff in an action of tort, but not in an action upon contract for wheat sold and delivered, and for such cause of action he could not recover in this action without first getting leave to amend his complaint. Pierce v. Carey, 37 Wis. 232-237; Supervisors v. Decker, 30 Wis. 624; Gaston v. Owen, 43 Wis. 103-106; Vassau v. Thompson, 46 Wis. 345-351; s. c., 1 N. W. Rep. 4. Whether an amendment should be permitted in such case, is a matter of grave doubt. See cases above cited.

If the evidence is sufficient to show a sale upon credit to Grist as agent of the defendants, and that the wheat was delivered to the defendants and received by them of Grist, still they would not be liable to the plaintiff unless they received the wheat knowing it had been bought upon credit, or they had received the wheat of Grist knowing they had no funds in his hands at the time sufficient to pay for the same. If they fur-

nished money to their agent sufficient at all times to pay for all the wheat they received from him, they had the right to suppose that all the wheat bought by Grist for them was paid for at the time it was delivered to them, and, if he had not in fact paid for it, they would only be liable to the seller under the circumstances above stated. The objection to the evidence as to what Grist said when the wheat was delivered to him, as to whom he was buying it for, was objectionable if offered for the purpose of showing he was buying it as agent of the defendants; but as the whole evidence shows that he was the agent of the defendants at the time the wheat was delivered, its admission could not injure the defendants. What was said by Grist to the plaintiff two days afterwards about his having sent the wheat to the defendants was clearly inadmissible. There is, however, no objection to this part of the testimony. The refusal to permit the defendant to show that the plaintiff had arrested Grist for taking the wheat in question, was, we think, an error. The question in issue was whether the plaintiff had sold the wheat to the defendants. Any conduct or admission on the part of plaintiff which tended to disprove such sale was clearly admissible against him. If he arrested Grist for the conversion of this wheat, it must have been on the theory that the wheat belonged to the plaintiff when such conversion took place; and that fact would be inconsistent with the other fact that it belonged to the defendants.

We think the verdict was wholly unsupported by the evidence, and for that reason the judgment should be reversed. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

BANK — NOTICE — NEGOTIABLE PAPER ARISING OUT OF OPTIONS.

SHAW v. CLARK.

Supreme Court of Michigan, October 31, 1882.

1. A bank discounting negotiable paper upon the recommendation of a director is not charged with notice of facts within his knowledge, simply because he is a director, unless he controls its discretion or acts as the agent of the bank.

2. Negotiable paper arising out of transactions known as "option deals," does not fall within the meaning of a statute rendering void all instruments, the consideration of which is money won at gaming. Penal statutes can not be enlarged by intendment.

Error to Wayne.

Ed. E. Kane, for plaintiff; *Geer & Williams*, for defendants and appellants.

COOLEY, J., delivered the opinion of the court:

This suit is upon a note given by the defendants under the partnership name of John Clark & Sons for $4,000, dated October 29, 1879, and payable ninety days after date to the order of Johnson, Shaw & Co., and discounted by the First National Bank of Pontiac, and the plaintiff, just before it fell due, paid the amount to the bank and it was transferred to him. The defense made to the note is that it was given for a gambling consideration, and that the plaintiff is not a holder in good faith. The facts appear to be that previous to the date of the note the makers had been dealing in wheat "options" through two commission houses in Detroit, and a sum, of which this note represents a part, was then claimed of them as "margins." Demand for the payment of this sum was made, and they were not prepared to meet it. By arrangement with Johnson, Shaw & Co., who were also commission dealers in grain, that firm took the deals off the hands of the other houses, and undertook to carry them, defendants at the same time giving their notes for the margins. Plaintiff, who was cognizant of all the facts, and was at the same time a director in the First National Bank of Pontiac, recommended the note to that bank for discount, and it was discounted on his recommendation. He testifies that it was because he had advised the bank to take it up, he paid the bank and took it himself. Plaintiff is father to one of the partners in Johnson, Shaw & Co., and the partnership was at that time largely indebted to him.

In the trial court defendants insisted on their right to go the jury on the question whether the bank received and held the note in good faith. Plaintiff had testified in a general way that he, as director, represented the bank at Detroit; and it was insisted that there was enough in the case to justify an inference that the knowledge the plaintiff had of the facts was communicated to the bank, or, if not, to charge the bank by construction of law, with such knowledge as was possessed by the plaintiff, who in this transaction should be regarded as being its agent. But there was not the slightest evidence that either of the managing officers of the bank were notified of any defect or infirmity in the consideration, or that the plaintiff had any other agency in the bank than such as is implied in his being a member of the governing board. If the plaintiff as officer or agent of the bank had discounted the note in person, the bank might have been charged with constructive notice of such facts as were within his knowledge (Bank of United States v. Davis, 2 Hill. 451; Nat. Secur. Bank v. Cushman, 121 Mass. 490); but the mere fact that he was director did not charge the bank with knowledge. This was so held in Custer v. Tompkins County Bank, 9 Pa. St. 27, though the director was present when paper obtained without consideration was discounted, and was in fact an indorser upon it. To the same effect are Washington Bank v. Lewis, 22 Pick. 24; Terrill v. Branch Bank of Mobile, 12 Ala. 502; and Nat. Bank v. Norton, 1 Hill, 572. In this case the plaintiff did not act for the bank at all; he recommended the paper to the proper officers as suitable paper to be received and discounted by them; and they took it, acting upon

his recommendation, as they might have done on the recommendation of any other person, but in the exercise ot a discretion which the plaintiff did not control. Nothing, therefore, appears to impeach in any way the holding of the bank as a holding in good faith.

But it is further claimed that even if the bank was holder in good faith, plaintiff, with his knowledge of the want of legal consideration, could not acquire a good title by assignment. The general rule is admitted to be, that one who holds negotiable paper by unimpeachable title may transfer a like title to any other person, and that knowledge on the part of the transferee of original defects or equities will be of no moment. Kost v. Bender, 25 Mich. 516; Wood v. Starling, 12 N. W. Rep. 866. But this case is said to be taken out of the general rule by the express provisions of section 1996 of the Compiled Laws; and we are referred to that section as being conclusive against a recovery. The provision is as follows: "All notes, bills, bonds, mortgages, or other securities or conveyances whatever, in which the whole or any part of the consideration shall be for any money or goods won by playing at cards, dice or any other game whatever, or by betting on the sides or hands of such as are gaming, or by any betting or gaming whatever, or for reimbursing or repaying any money knowingly lent or advanced for any gaming or betting, shall be void and of no effect as between the parties to the same, and as to all persons except as to those who hold or claim under them in good faith and without notice of the illegality in such contract or conveyance." It is said by the defense that the purchase of options is nothing but betting on a future market, and that the case is directly within the terms as well as the mischief of the statute.

There is no doubt that a purchase of options is opposed to public policy by reason of its demoralizing character, and that any contract which has no other consideration is void in law. This was in effect decided in Gregory v. Wendell, 39 Mich. 328; s. c., 40 Mich. 432. But that decision was grounded on general principles of the common law; and the statute now brought to our attention was not relied upon or referred to by counsel or by the court. It was shown in that case that such a purchase was in the nature of a gambling contract, and that the evils of ordinary gaming inhered in it. But it was not said or intimated that it was gaming in the ordinary sense of that term, or that the parties to it could be considered as parties to a bet or wager. And as the statute now invoked was not then before the court, nothing said in the opinions can be considered as expressly designed to throw light upon its construction.

In common speech gaming is applied to play with stakes at cards, dice or other contrivance, to see which shall be the winner and which the loser. A contract for the purchase of options is not gaming within this meaning of the term. In form it is the purchase and sale of a commodity to be delivered at a future day, and it only resembles gaming in that the parties take a chance ot gain or loss, without intending that the sale which they nominally make shall ever become a legitimate business transaction. Betting in common speech means the putting of a certain sum of money or other valuable thing at stake on the happening or not happening of some uncertain event. A purchase of options is not betting in this sense, though it resembles it in the fact that risks are taken on uncertain events, and that the tendency to those engaged in it is demoralizing. The statute in terms forbids betting and gaming, and it contains penal provisions for the punishment of those who engage in them; but penal statutes are not enlarged by intendment, and acts not expressly forbidden by them can not be reached merely because of their resemblance, or because they may be equally and in the same way demoralizing and injurious. The principles of the common law adapt themselves to new conditions of things, and may defeat a demoralizing transaction or contract, though it be the first of its kind; but penal statutes are not flexible, and they can be made to embrace nothing which was not within the intent of the legislature in passing them. If other things equally injurious seem to deserve the same punishment, the legislature alone can provide for it.

We have no idea that the purchase of options was in the mind of the legislature when passing the statute against betting or gaming. We have not overlooked what is said in Barnard v. Backhaus, 52 Wis. 593; s. c., 6 N. W. Rep. 252; 9 N. W. Rep. 595, regarding a similar statute, but we do not understand the remarks of the court as expressive of an opinion that such a transaction is betting or gaming within the meaning of the statute. The statute is referred to as indicating a general policy opposed to all such dealings; and we agree in what is said on that subject. It is in the light of that policy, evidenced by the common law as well as by the statute, that we hold the note in suit to have been given without consideration; but when the defense of invalidity is interposed after the note has been in the hands of a *bona fide* holder, the defendants must place their reliance upon the statute exclusively, it being admitted that the mere fact that the note was void in its inception is not sufficient for their purposes. The statute, we think, does not reach the case.

The defense also claimed the right to argue to the jury that plaintiff did not purchase the note of the bank, but paid it. The circuit judge thought there was no evidence tending to prove such a judgment; and we agree in this. Plaintiff testified that he took the note from the bank because he had recommended it, and not with any view to payment. He admitted that he included it in his account against Johnson, Shaw & Co., but this was not inconsistent with the testimony that he expected to look to defendants for payment; for he had a right to look to the makers and also to the indorsers. It is urged that the jury might not

have believed his evidence; but it is certain that if his evidence were disbelieved and rejected, there would be nothing left on which to base any defense whatever. No one else testifies to any facts tending to show that the plaintiff's holding is not for value, or that he took the note by way of payment. We think the judgment must be affirmed with costs.

The other justices concurred.

WEEKLY DIGEST OF RECENT CASES.

1. BOUNDARIES—MONUMENT—STAKE.

This court having decided on former appeals, in a case involving a dispute as to the boundaries of lots, that the location of a certain stake referred to in the first conveyance after the lots were platted must, if it can be determined, control in fixing the line between the lots of the respective parties, but that if the place where the stake stood can not be identified the plat must control, it is *held* to be immaterial who set the stake by a reference to which such conveyance was made, and an instruction to the jury making it necessary for them to find that the stake was set by certain persons before they could find it was a controlling monument, is erroneous. *Lanipe v. Kennedy*, S. C. Wis., November 21, 1882; 14 N. W. R., 43.

2. CONTRACT—CONSTRUCTION—SALE AND COUNTING OF BARREL HEADINGS—FRAUD—EVIDENCE.

Where a contract was made between two parties for the delivery of a certain number of matched barrel headings, the delivery to be on a piece of land owned by the purchaser, where also the pieces composing the barrel headings were to be approximately counted for the purpose of regulating advances to the vendor, but the final count of the matched headings was to be made by an inspector appointed by the purchaser at a different place than the place of delivery, to which different place they had been transported by the purchaser, it was *held*: 1. That while it was true that the count of this inspector could be attacked only for fraud or for mistake too great to be explained by a mere error of judgment, yet in proving such mistake the count of the single pieces made at the place of delivery was admissible in evidence. 2. That the failure of the vendors to prove that none of the pieces were lost in transit, was not sufficient to upset the verdict, because that was a matter for the consideration of the jury; and even if such a loss had occurred it would have fallen on the purchaser, as it was after delivery. 3. An account rendered, if not objected to in a reasonable time, becomes an account stated, and is then impeachable only for fraud or mistake. 4. The question as to the amount to be awarded in such a case is for the jury, who are to decide between the two conflicting counts. 5. A question asked a witness, "Have you not stated to different parties that you wanted them to recover here, as you would then get your pay?" was too indefinite to lay the foundation for contradicting him, and was properly excluded, although counsel disclaimed any intention to impeach the witness. *Standard Oil Co. v. Van Etten*, U. S. S. C., November 20, 1882; 5 Morr. Trans., 183.

3. CRIMINAL LAW—ILLEGAL SALE OF LIQUOR—CONCEALED DRAWER.

In a prosecution for selling liquor without license, the fact that the witness dropped a dime into a drawer and called for whisky, whereupon the drawer passed through a partition, and came back with a glass of whisky in it, but no person was seen or heard on the premises, was sufficient to authorize the jury to infer that the sale was made by the defendant, or by his authority and direction. Where, in his argument to the jury, counsel for the State comments on the refusal of the defendant to testify in a criminal case, such violation of the statute is not cured by an instruction of the court that the jury can not take such silence of the defendant into consideration. *Shewalter v. State*, S. C. Ind., Dec. 14, 1882.

4. DAMAGES—LOSS OF TIME AS AN ELEMENT.

The element of damages which consists of loss of time is purely a pecuniary loss. If no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only. In such case a charge that plaintiff is entitled to recover compensation for time lost in consequence of confinement to the house is erroneous. *Leeds v. Metropolitan Gas Light Co.*, N. Y. Ct. App., Oct. 10, 1882; 2 N. Y. Cond. R., 8.

5. DIVORCE—GRANTED IN FOREIGN STATE—JURISDICTION.

Although marriage is a *status*, and every State has the right to fix, regulate and control the same as to every person within its jurisdiction, even though one of the parties may at the time actually reside in another State, yet a judgment of divorce granted in another State, under statutes making jurisdiction dependent entirely upon the residence there of the party applying for a divorce, at the suit of a husband, against a wife who resided in this State, and who was not personally served with notice, and did not appear in the action, but was ignorant of its pendency until after judgment was rendered, is not a bar to a subsequent action by such wife in this State for divorce, alimony, allowance and a division of the property of such husband situated within this State, especially where such foreign judgment was based upon an alleged cause of action which was false in fact. *Cook v. Cook*, S C. Wis., Nov. 21, 1882; 14 N. W. R., 33.

6. EVIDENCE — LIMITS OF CROSS-EXAMINATION—EXPERT WITNESS.

Parties desiring the opinion of their opponent's witness as an expert must call him as such, and not interject their defense by means of cross-examination. *Olmsted v. Gere*, S. C. Pa., Oct. 2, 1882; 39 Leg. Int., 458.

7. EVIDENCE—FRAUDULENT CONVEYANCE—SUBSEQUENT ADMISSIONS OF VENDOR.

In an action in the nature of a creditor's bill, to set aside a sale of personal property by the judgment debtor on the ground that it was fraudulent as to

creditors, the declarations or admissions of the vendor made subsequent to the sale, and independent of it, tending to show a fraudulent purpose on the part of the vendor in the making of the sale, are not competent as evidence. Upon a charge of conspiracy to defraud, such declarations, being a mere narration of past events, and not made in furtherance of the conspiracy, are not admissible. *Adler v. Apt*, S. C. Minn., Nov. 28, 1882; 14 N. W. R., 63.

8. EXECUTION—LEVY—IMPLIED WAIVER OF EXEMPTION.

A debtor who does not in some manner indicate to the officer making a levy his purpose to claim the property levied upon as exempt from execution, if present at the time of such levy, waives the exemption. *Moffitt v. Adams*, S. C. Iowa, Dec. 6, 1882; 14 N. W. R., 88.

9. FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

1. Where an exception is made to the admissibility in evidence of a deed for the then Territory of Colorado on the ground that such Territory had no right to take such a conveyance without the assent of the United States, and the exception is overruled, and no Federal statute is referred to creating the disability, the record does not show that a Federal question is involved sufficiently plain to give the court jurisdiction. 2. The failure of the Territory to carry out a condition in the deed may have been a violation of the contract, but did not impair its obligation. *Brown v. Colorado*, U. S. S. C., Nov. 20, 1882; 5 Morr. Trans., 147.

10. HUSBAND AND WIFE—SEPARATION—CLAIM FOR NECESSARIES FURNISHED THE WIFE.

The *bona fide* purchaser for full value of the husband's property after separation from his wife acquires a valid title as against a subsequent judgment obtained by the wife's father for board and necessaries of the wife during such separation, there having been no libel for divorce or application for alimony filed by the wife. *Lamar v. Jennings*, S. C. Ga., Dec. 12, 1882.

11. INSOLVENCY—ASSIGNMENT FOR BENEFIT OF CREDITORS—CREDITORS' RIGHTS.

1. A deed of assignment for the apparent benefit of creditors made by a manufacturing company, which pledges the property of the company to the payment of other indebtedness than that of the company, is fraudulent and void as to non-assenting creditors of the company. 2. An assignment for the benefit of creditors by a manufacturing company which permits the assignee to continue the business of the company at the expense and risk of the creditors, but free from their control, is fraudulent and void as to non-assenting creditors. *DeWolff v. Sprague Mfg. Co.*, S. C. Err. Conn., October, 1882; 14 Rep., 717.

12. MALPRACTICE—DAMAGES—EVIDENCE.

In a suit to recover damages for unskilful treatment, causing a deformity of limb, it is error to reject the testimony of a witness which would tend to satisfy the jury that the limb was in as good a condition as could ordinarily be expected in such a case when properly treated by skilful surgeons; and such error would not be fully cured by allowing subsequent testimony from the same witness as to the effect of the general results of the same injuries when treated with skill. *Olmstead v. Gere*, S. C. Pa., October 2, 1882; 39 Leg. Int., [458.

13. NEGLIGENCE—TRESPASSING INFANT—DUTY OF RAILROAD.

A child between five and six years of age, not a passenger, without invitation from any one, went on the platform of the railroad company at a station and stood so near the track as to be struck and injured by a passing car. *Held*, that the child was a trespasser; the company owed him no duty and would not be liable for anything less than wanton or intentional injury. Unless the duty of protection is owed, the omission to furnish it is not negligence, and no liability is incurred therefor either to adults or children. *Baltimore, etc. R. Co. v. Schwindling*, S. C. Pa., November 20, 1882; 13 Pittsb. L. J., 155.

14. NEGOTIABLE PAPER—ENDOWMENT NOTE—NON-NEGOTIABLE—PAROL EVIDENCE.

Defendant's intestate executed the following note: "Ten years after date I promise to pay to the treasurer of Wilton Collegiate Institute $1,000 as endowment, with annual interest at ten per cent., to secure two perpetual scholarships, No. ——, in said collegiate institute; said scholarships to be available on the payment of the interest annually." Plaintiff purchased this note at a sheriff's sale made to satisfy the debts of the Wilton Collegiate Institute, and brought suit thereon against the estate of the maker. *Held*, that this note was not negotiable; that it showed upon its face that it was an endowment note; that it might be shown by parol that it was given to establish an endowment fund; and that the maker had never received the scholarships, in consideration of which the note was given, by reason of the insolvency and dissolution of the institute, and that as such a note could not be sold to pay the debts of the institution, being merely a part of a trust fund intended to be established, the plaintiff could not recover. *Ingham v. Dudley*, S. C. Iowa, December 5, 1882.

15. PARTNERSHIP—EVIDENCE—DISSOLUTION—BALANCE SHEET.

In an action upon a note purporting to be made by a firm where a defense is interposed that such note was made by one of the partners after dissolution: *Held*, that a balance sheet, after such dissolution, under the direction of the other partner, not shown to be a transcript of the books of the firm, and which did not mention the note, was not admissible; that the admissions of one partner, while in possession of the note, to the other, forming no part of the *res gestæ*, are not admissible against plaintiffs, who were holders for value; that the paper was not admissible as a contradiction of the partner from whom plaintiffs purchased, as his attention had not been called to it, and that the fact that notice of dissolution was mailed to plaintiffs in an unsealed envelope was immaterial. *Clews v. Kehr*, N. Y. Ct. App., October 10, 1882; 2 N. Y. Cond. Rep., 5.

16. RAILROAD MORTGAGE—FORECLOSURE—CREATION OF RECEIVER'S OBLIGATIONS.

1. In August, 1870, a first mortgage on a railroad was made. In January, 1873, a second mortgage on the same railroad was made. Both mortgages covered after-acquired property. A default on the first mortgage occurred in November, 1873, and on the second mortgage in January, 1874. In August, 1874, the second mortgagee filed a bill to foreclose the second mortgage, making the first mortgagee a party, acknowledging the priority of the first mortgage, not praying any relief against the first mortgagee, and praying for a receiver,

and for the payment of his net revenue to those entitled to it. On the same day, an order was made appointing one Schuyler receiver, and directing that a copy of the order be served on the first mortgagee, a corporation, requiring it to appear "on or before" the first Monday of November then next, and authorizing the receiver to pay the arrears due for operating expenses for a period in the past not exceeding ninety days. A copy of the order was served on the first mortgagee three days afterwards, and proof of that service was filed two days after the service. In October following, the receiver, on his petitions filed, was authorized, by order, to purchase certain rolling stock, and to pay indebtedness, not exceeding $10,000, to other connecting lines, for materials and repairs and for ticket and freight balances, a part of which was incurred more than ninety days before the order appointing the receiver was made, and to expend a sum named in building six miles of road and a bridge, which were part of the main line of the road, and the expenditures were charged as a first lien on the earnings of the road. The first mortgagee appeared and answered on the first Monday of November, and not before. The answer objected to the creation of fresh indebtedness. Nothing more was done in the suit for eleven months. Then the receiver reported that he had built the six miles and the bridge, and purchased rolling stock and incurred debts therefor. He also filed a petition showing that his trust owed $232,000, and asking leave to borrow that amount and $90,000 to put the road in order, on receiver's certificates, to be made a first lien. The petition set forth a meeting of both classes of bondholders, at which, on the report of a committee, the receiver was directed, by a resolution passed, to obtain authority to borrow $322,000 on receiver's certificates. An order was made authorizing him to borrow $201,000 on receiver's certificates, payable out of income, and to be provided for in the final order of the court in the suit, if not paid out of income. Soon after four holders of first mortgage bonds were made defendants, with leave to answer and to file a cross-bill. They answered and filed a cross-bill in November, 1875, to foreclose the first mortgage. The cross-bill claimed that the six miles of road, and the bridge and the rolling stock, and the other property acquired by the receiver, were subject to the lien of the first mortgage, and that the mortgagor had been insolvent from October, 1873, and affirmed the foregoing statement as to the meeting of the bondholders and their resolution, and stated that the plaintiffs in the cross-bill had desired and sought for more than a year to have the first mortgage foreclosed; that the $201,000 ought not to be borrowed and made a first lien on the road; and that the receiver ought to be removed and another receiver appointed under the cross-bill. In December, 1875, a reference was made to take evidence on the subject of the appointment of a new receiver. More than four months after that the first mortgagee answered the cross-bill, and, the two suits being ready for hearing, they were consolidated and heard. One decree was made in them in May, 1876, declaring that both mortgages covered all the property held by the mortgagor when the original suit was brought and all subsequent additions thereto, and providing for a foreclosure of the right of the second mortgagee to redeem, and for the presentation to a master of claims against the property and the receiver. In July, 1876, one Claybrook was appointed additional receiver in the original suit. He acted, after August 11, 1876, as sole receiver until August 25, 1876, after which he and Schuyler were joint receivers, until December, 1876, when Schuyler resigned. Claybrook, on August 12, 1876, took possession of the entire property which Schuyler had, including a railway twenty-three miles long, used under a lease from another company. The master reported as to claims against the property and the receiver from time to time. The plaintiffs in the cross-bill interposed objections to making any of the claims prior in lien to the lien of the first mortgage. In January, 1879, the court, by order, allowed certain claims, many of them not over $5,000, specifying the names of the claimants and the amounts allowed, and giving the claims allowed preference in payment, out of the income and proceeds of sale, over the claims of the mortgagees. In this order the plaintiffs in the cross-bill prayed an appeal to this court. In July, 1879, the court made a decree for the sale of the road as an entirety, and for the payment out of the proceeds of sale of the claims allowed, before paying any principal or interest on the mortgage debts. In this decree the plaintiffs in the cross-suit prayed an appeal from it to this court. On a hearing of the appeal: *Held*, 1. The appeals were appeals in open court, not requiring citations, and the order and the decree appealed from sufficiently designated all the appellees by name. 2. The first mortgagee was a proper party to the original bill of foreclosure, because a receiver was prayed for; and the order appointing the receiver having been served on the first mortgagee three days after it was made, such mortgagee was bound to protect promptly the interests of the first mortgage bondholders. 3. The original bill did not seek to create a receivership for the sole benefit of the second mortgage bondholders. 4. The property in court under the original bill was the entire mortgaged property, and not merely the equity of redemption of the mortgagor as against the second mortgagee. 5. The exclusive right of a second mortgagee to the income of a receivership created under a bill filed by him is limited to a case where the first mortgagee is not a party to the suit. 6. The first mortgagee having been entitled, by the terms of the first mortgage, to take possession of the mortgaged property and operate the road, and the cross-bill not having been filed for more than a year after the receiver was appointed and the first mortgagee had appeared and answered in the original suit, and it having been, in judgment of law or in fact, fully known all the time, to the first mortgage bondholders, what was being done by the receiver in creating the claims, it was inequitable for the appellants to lie by and see the receiver and the court dealing with the property in the manner complained of, and merely protest generally and disclaim all interest under the receivership, and yet assert in the cross-bill that the property acquired by the receiver was subject to the lien of the first mortgage, and claim the proceeds of that property without paying the debts incurred for acquiring it. 2. The power of a court to create claims through a receiver, in a suit for the foreclosure of a railroad mortgage which shall take precedence of the lien of the mortgage, considered and upheld. 3. The provisions allowing the receiver to pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and to pay indebtedness not exceeding $10,000 to other connecting lines for material

and repairs and for ticket and freight balances, a part of which was incurred more than ninety days before the order appointing him was made, and to purchase rolling stock and to build six miles of road and a bridge, part of the main line of the road, and making such expenditures a lien prior to the lien of the mortgagees, upheld. 4. The mortgagor held a leased road under a written lease providing for rent and for payment for depreciation, and for the payment of a monthly rent by the lessor to the lessee for the use of a part of the road. The successive receivers took possession of the leased road, and ran it as a continuation of the mortgaged road. Part of the rent which accrued before Claybrook became receiver was unpaid. Claybrook, after he became receiver, paid the rent as it accrued. The successive receivers collected the rent monthly from the lessor for the use of a part of the road. The court allowed to the lessor, as a claim preferred to the first mortgage, a sum for the use of the road, based on the actual value of its use by the receivers, and for depreciation, and allowed, with a like preference, claims for operating supplies and materials furnished for the road while so run: *Held*, that the allowances were proper. 5. The final decree was not erroneous in not requiring the accounts of the receiver to be settled before paying, out of the proceeds of sale, the debts allowed against him, nor in ordering the sale of the property as an entirety without separating that acquired by the receiver. 6. The question of the jurisdiction of this court in respect of the claims not over $5,000 was not considered. 7. The decree was affirmed. *Miltenberger v. Logansport, etc. R. Co.*, U. S. S. C., Nov. 20, 1882; 5 Morr. Trans., 151.

17. SALE—REPRESENTATION RELIED ON—WARRANTY.

Any asserti on or affirmation made by the seller to the purchaser during the negotiations to effect the sale, respecting the quality of the article or the efficiency of the machine sold, will be regarded as a warranty if relied upon by the purchaser in making the purchase. *Neave v. Arntz*, S. C. Wis., November 21, 1882; 14 N. W. R., 41.

18. TAXATION — CAPITAL STOCK OF FOREIGN CORPORATION.

Foreign corporations doing business within the State of Pennsylvania are liable under existing laws to pay a license tax for the protection afforded by the State to such corporations; but they can not be taxed for the whole amount of their capital stock unless they make this State their domicile and the *situs* of their property. The mere act of a foreign corporation sending its agents to transact business within this Commonwealth does not render its entire capital stock liable to taxation under existing laws. The State has no power to tax foreign corporations for the mere holding of stock in corporations or limited partnerships in this Commonwealth, which have already paid the tax levied upon them. Distinction, for the purposes of taxation, between capital stock of a corporation and the certificates of stock held by its members. A foreign corporation does not render itself liable to taxation within this State by the purchase of raw material which is shipped to its place of domicile for manufacture. When an act giving to the Commonwealth the power of collecting taxes, together with penalties for non-payment, etc., is repealed, reserving to the Commonwealth the right to collect all taxes accrued, the penalties can not be recovered upon suits afterwards instituted to collect the taxes. *Commonwealth v. Standard Oil Co.*, S. C. Pa., November 20, 1882; 39 Leg. Int., 451.

19. WILL—CONSTRUCTION—EVIDENCE OF EXTRINSIC FACTS.

1. The usual rule excludes evidence of extrinsic facts, in the construction of wills, for the purpose of controlling or varying the terms of the will, except to rebut a resulting trust, or to explain a latent ambiguity; and there are respectable authorities which hold parol evidence admissible to explain patent ambiguities on the face of the will. 2. But the principle is indisputable, that when the words of the will are clear, and have a definite meaning, however awkwardly expressed, extrinsic evidence can not be received to show a different meaning, contradictory of that imported by the testamentary language. *Lee v. Shivers*, S. C. Ala., 1882; 1 Ala. L. J., 361.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

49. The statutes of Missouri give the county court power to incorporate platted towns and their commons See 61 Mo. 203. A town was platted on both sides of the right of way of a railroad. Could the town be legally incorporated by including the railroad right of way in the metes and bounds, or could the town be incorporated by leaving the railroad right of way out, and thus have the town divided in two parts? SUBSCRIBER.

50. A, having four children living, and a grandchild by his daughter N, and four grandchildren by his son F, made a will in which he made bequests as follows: To my son A, one-sixth part of my estate; to my son B, one-sixth part of my estate; to my daughter H, one-sixth part of my estate; to my son C, one-sixth of my estate; to my daughter N's child, one-twelfth part of my estae; tothe children of my son F, one-fourth part of my estate. Prior to the decease of testator, the son C and the daughter H died leaving no issue. Supposing the estate to be $12,890, what amount would each of the survivors receive? How shall the portion of the deceased children be distributed? Cite authorities. F.
Worcester, Mass.

51. A, for a valuable consideration, delivers to B a written obligation to sell and deliver to B, at any time before June 1, 1,000 bushels of wheat at $1 per bushel, payment of the money and delivery of the wheat to be made at the office of C, a warehouse keeper with whom A had wheat stored. Afterwards, on May 1, A died. On May 10, B tendered C $1,000 and demanded the wheat which was still in store. C declined to accept the money or deliver the wheat, on the ground that the power and authority which he had had so to do as the agent of A, had been revoked by A's death. May 20, administrators of A's estate were appointed

and qualified. June 5, A's administrators tendered the wheat to B, who then declined to receive or pay for it. The market value of wheat on May 10 was $1.15 per bushel; on May 15, when it reached the highest price, it was $1.20 per bushel, and on June 5, 95 cents per bushel. B sues A's administrators. Can he recover? If so, what is the measure of damages? Is it the difference between $1 and $1.15 per bushel, or is it the difference between $1 and $1.20 per bushel, or is it neither?

52. A sells chattels to B, which are mortgaged, the mortgage being at the time duly recorded. C, a creditor of A, garnishes B. B answers as garnishee that he is indebted to A in the sum of $50, the same being the purchase price of the said chattels. When this answer of B is made, and before judgment is entered against him, D, the mortgagee, intervenes and claims that the proceeds of the said chattels, to-wit, said $50, should be applied toward the payment of his mortgage. Query. Should the money in the hands of B be adjudged to C or to D? IOWA.

Fort Dodge, Iowa.

53. A files a petition for alternative writ of mandate against B, a turnpike company, praying that B be required to transfer on her books certain shares of stock to A, which A claims to have purchased from C, the former owner. Retnrn to the writ by B, that C only pledged the shares to A for a sum of money advanced by A, and that B (the company) had since purchased the shares from C, and had tendered A the full sum he had advanced to C. 1. Can B set up such defense, *i. e.*: Can a corporation buy the shares of its own stock? 2. Has A the right in such a case to demand a trial by jury? O.

54. 1. Where a husband, wife and husband's bachelor brother live together for five years. and the husband's brother buys a large wooden building and moves it on the wife's town lot with the knowledge of the husband, but without asking the wife's consent, and the wife takes no steps to have it removed, and lets it stay there three years, and the husband and brother occupy it for different purposes during that three years, and then the brother rents it for a dramshop for ten months, and it is so occupied, and the brother "clerks" for the dramshop keeper, and boards with the wife and her husband within one block of the dramshop for said ten months, and the wife takes no steps whatever to have said dramshop removed off her lot—in such case, is the wife liable under sec. 9 of the Illinois Dramshop Act for damages done by an habitual drunkard to whom said brother there sold intoxicants? 2. Is a judgment obtained for damages under said section before a justice of the peace, a lien on real estate? 3. If it is such a lien, when does said lien attach? When the intoxicant is sold and the damage done, or when the judgment is obtained? or when proceedings are had to subject the same to the payment of the judgment? See sections 10 and 11.

Bushnell, Ill. J. T. S.

NOTES.

——A lawyer, explaining the meaning of a "contingent fee" to his client, said: "If a lawyer loses the case, he gets nothing. If he wins, you get nothing."

——A certain barrister named Jones, who practiced in Brougham's time, contracted a habit of commencing the examination of a witness with these words: "Now, sir, I am going to put a question to you, and I don't care which way you answer it." Brougham had begun, like many others, to grow tired of this eternal formula. One morning he met his brother lawyer near the Temple, and addressed him thus: "Now, Jones, I am going to put a question to you, and I don't care which way you answer it—How do you do?"

——Nobody was more bitterly witty than Lord Ellenborough. A young lawyer, trembling with fear, rose to make his first speech, and began: "My lord, my unfortunate client—my lord, my unfortunate client—my lord, my unfortunate client—my lord—" "Go on, sir, go on," said Lord Ellenborough; "as far as you have proceeded hitherto, the court is entirely with you."

——The following anecdote about a lawyer by the name of Meek comes to us from Eastern Indiana. By the way, what a name for a lawyer is Meek. It reminds us of meeting on the cars a few days ago a gentleman by the name of Blush, from Boston, who was not in the least offended when we suggested that he ought either to change his name or place of residence. But to return to the anecdote. Meek was not as his name would seem to indicate, but on the other hand would have been more appropriately named if "Ch" had been substituted for "M." Although but a pettifogger, and densely ignorant in the law, he did not hesitate to meet the ablest talent alone and unassisted, among whom was ex-Judge M, who always called him Meeks instead of Meek. Meek's client noticing this, and suspecting that his attorney was being made game of, asked him one day why it was that Judge M always seemed to refer to him with a kind of sneer, and why he always called him Meeks when his name was Meek. "Oh," said Meek, "it is simply because I always beat him so badly in his cases that he imagines there are two of me."

——"I nebber heard dat dis club entertained any sich superstishun," said Brother Gardener in reply. "So fur as de average lawyer goes, dis club has no particular respect for him. De average criminal he keeps out of jail. De thief breaks the law to git money. De lawyer defends the thief for the same purpose, an' it most allus happens dat de thief am dun cleaned out when the lawyer am frew wid him. But de greatest criminal an' de meanest men are generally given time to repent. Arter de lawyer begins to grow old an' de rheumatisim cotches on, and his wife dise, an' his house burns up widout insurance, he am forced to reflect on his past life, an' dat reflecksbun probably brings repentance. I doan' s'pose heaben am crowded wid lawyers, but I recken dat 'nuff of 'em squeeze in to keep tings pretty lively for sich angels as disturb de peace or obstruct de sidewalks."—*Brother Gardener on Lawyers, in Detroit Free Press.*

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Cases reported in full are cited by the names of the parties. Reference to digested cases are indicated by the abbreviation dig.; to the Current Topics, by C. T.; to the Correspondence by Corresp.; to Queries and Answers, by Q. & A.; and to Notes by n. or note.